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In the Supreme Court of the United States

October Term 1956

No. ———

A. ARNOLD AXILROD

Petitioner

vs.

STATE OF MINNESOTA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above entitled action on December 26, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Minnesota, filed November 15, 1956, is as yet unreported officially but has been reported at 79 N. W. 2d 677 and is printed in Appendix A hereto, *infra*, p. 1a. The supplemental opinion of the Supreme Court of the State of Minnesota, filed December 14, 1956, denying a petition for rehearing before that court is also as yet unreported officially but has been reported at 79 N. W. 2d 683 and is printed in Appendix B hereto, *infra*, p. 10a.

JURISDICTION

Petitioner was indicted in Hennepin County, Minnesota, on May 2, 1955, on a charge of first degree murder to which indictment he entered a plea of not guilty on May 3, 1955 (R. 1, 2). Petitioner was found guilty of first degree manslaughter in Hennepin County District Court on November 3, 1955, and sentenced on the same day (R. 1771, 1780). In accordance with Minnesota Statutes Annotated (hereinafter abbreviated as M. S. A.), petitioner duly took an appeal to the Supreme Court of the State of Minnesota which is the court of last resort of that state. *Constitution of the State of Minnesota,* Art. VI, §§1, 2.

The judgment of the Supreme Court of the State of Minnesota affirming the judgment of the Hennepin County District Court was entered on December 26, 1956 (see Appendix C, *infra,* p. 11a.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), since petitioner is setting up and claiming rights under the Constitution of the United States.

QUESTIONS PRESENTED

I. Has a defendant, charged with first degree murder in the Minnesota District Court, been deprived of due process of law or the equal protection of the laws under Amendment XIV of the Constitution of the United States by an arbitrary denial of his motion for an order permitting him to take pre-trial discovery depositions upon oral examination in the same manner as such depositions were then taken in civil actions under the Rules of Civil Procedure in and for the District Courts of Minnesota, when by such denial that court arbitrarily refused to comply with a valid and subsisting Minnesota statute specifically authorizing the granting of defendant's motion?

II. Is a defendant, on trial for first degree murder in the Minnesota District Court, deprived of due process of law under Amendment XIV of the Constitution of the United States when, over objections duly made by defendant, the trial court twice erroneously instructs the jury:

> "Every homicide is presumed unlawful, so that when the mere act of killing is proved, without any more being shown, the killing is presumed to be intentional and malicious and prompted by the ordinary and natural operations of the mind."?

III. Is a defendant, on trial for first degree murder in the Minnesota District Court, deprived of due process of law under Amendment XIV of the Constitution of the United States when the trial court in instructing the jury on verdicts it could bring in for offenses lesser than first degree murder refuses, over objections duly made by defendant, to charge the jury that the state has the burden of proving beyond a reasonable doubt all of the essential elements of any such lesser offenses?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the last two clauses of the second sentence of Section I, Amendment XIV of the Constitution of the United States:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

Petitioner was charged with having murdered Elizabeth Mary Moonen on or about April 22, 1955 (R. 1, 2). Trial commenced on September 19, 1955 (R. 109). The

case was submitted to the jury on November 1, 1955 (R. 1741), and a verdict of first degree manslaughter was returned some fifty hours later on November 3, 1955 (R. 1771).

Prior to the commencement of trial, by notice of motion dated August 24, 1955, and pursuant to *M. S. A.* §611.08, petitioner moved the trial court for an order to permit his attorneys to take pre-trial depositions on behalf of petitioner from ten named individuals, *said depositions to be taken in the same manner as depositions were then taken in civil actions under the Rules of Civil Procedure for the District Courts of Minnesota* (R. 3-4).

The relevant text of *M. S. A.* §611.08 is as follows:

> "DEPOSITIONS FOR ACCUSED. *Upon cause shown* to the court in which any criminal action is pending, a judge thereof may by order allow depositions of witnesses on behalf of the prisoner to be taken *in the same manner and in like cases where they may be taken in civil actions.*" (Emphasis supplied.)

The notice of motion was accompanied by supporting affidavits of defense counsel in which, pursuant to *M. S. A.* §611.08, *they showed cause* why the taking of the depositions should be permitted (R. 5-10).

The trial court denied permission to take depositions from any of the named individuals. *Its denial was not based upon lack of cause shown,* because, notwithstanding *M. S. A.* §611.08, it deemed itself without discretion in the matter (R. 19-20). The trial court was affirmed in this denial by the State Supreme Court. See in particular the Minnesota Supreme Court's interpretation of the trial court's reasoning at footnote 3, 79 N. W. 2d 680, Appendix A, *infra,* p. 4a.

By way of further factual background that is relevant hereto, the trial court twice gave the following instruction:

> "Every homicide is presumed unlawful, so that when the mere act of killing is proved, without any more being shown, the killing is presumed to be intentional and malicious and prompted by the ordinary and natural operations of the mind" (R. 1727, 1763).

Petitioner took due exception thereto (R. 1738, 1771).

Furthermore, in addition to submitting the question of first degree murder to the jury, the trial court submitted alternative verdicts embracing offenses lesser than murder in the first degree (R. 1727-1732; 1762-1765). Petitioner requested, in connection with the submission of any such alternative verdicts, that the trial court instruct the jury on each of the essential elements of said lesser offenses, and further requested an instruction that each of the essential elements of said lesser offenses must be proved beyond a reasonable doubt before a conviction could be had (R. 1695-1696, 1789). The court refused to so instruct (R. 1716-1737; 1751-1770).

Petitioner further requested, both with respect to the crime charged and any lesser offenses submitted, that the jury be instructed that the prosecution had to prove beyond a reasonable doubt that there was *no excuse or justification* for the homicide before it could convict for either the crime charged or for any of such lesser offenses (R. 1695-1696; 1788-1789). The court refused to so instruct (R. 1716-1737; 1751-1770).

We go into more detail as to the instructions requested, the instructions given and the effect thereof in our discussion of Question III raised in this petition.

How Federal Questions Were Presented

Although the opinions below do not purport to discuss the federal constitutional aspects of the questions raised herein

by petitioner, the questions were nonetheless timely preserved in the trial court and the constitutional arguments timely presented to the Minnesota Supreme Court, all with results adverse to petitioner.

Petitioner took an automatic exception in the trial court to that court's adverse ruling on petitioner's request to take pre-trial depositions in the manner as aforesaid (R. 109-110). Petitioner further took due exception to the trial court's twice given instruction as aforesaid that "Every homicide is presumed unlawful, etc."(R. 1738, 1771). Petitioner duly requested that the trial court instruct on each of the essential elements of the offenses lesser than murder in the first degree which were submitted to the jury, and further requested an instruction to the jury that each of the essential elements of said lesser offenses, including the negativing of excuse or justification, must be proved beyond a reasonable doubt before it could convict (R. 1789, 1788, 1695-1696). In his appeal duly taken to the State Supreme Court petitioner presented for the consideration of that court the following legal questions which were raised in accordance with Rules VIII and XXII of the Rules of Practice of that court (Vol. 27, *M. S. A.* 571, 580, 606):

> "1. Were the defendant's rights of due process under Article I, Section 7, of the Constitution of the state of Minnesota and the Fourteenth Amendment to the Constitution of the United States violated:
>
> (a) because the court denied defendant's motion, made and submitted before the commencement of trial, for an order allowing defendant to take a deposition on his behalf of each of the persons named in said motion, in connection with his defense, said depositions to be taken in behalf of defendant in the same manner as depositions were then taken in civil actions under the Rules of Civil Procedure for the District Courts of Minnesota; and

(b) because of the irregularities in the proceedings of the court, misconduct of the court and county attorney, and orders and abuses of discretion on the part of the trial judge?

"2. Was the defendant deprived of a fair and impartial trial because of irregularities in the proceedings of the court, misconduct on the part of the court and the county attorney, orders and abuses of discretion on the part of the trial judge and errors of law occurring at the trial which were duly excepted to at the time?" (See page 3 of certified copy of Appellant's Brief in Minnesota Supreme Court.)

After the broad assertion to the State Supreme Court in the above questions that federal constitutional rights had been denied by reason of errors committed during the proceedings below, petitioner thereupon made the following assignments of error, all in accordance with the aforesaid Rules VIII and XXII of the Rules of Practice of the Minnesota Supreme Court (Vol. 27, *M. S. A., supra*):

"1. The court erred in denying defendant's motion for an order allowing defendant's attorneys to take a deposition on behalf of defendant of each of the persons named in said motion, said depositions to be taken in behalf of defendant in the same manner as depositions were then taken in civil actions under the *Rules of Civil Procedure for the District Courts of Minnesota.*" (See pp. 29-30, certified copy of Appellant's Brief)

"29. The court erred in giving the following improper and prejudicial instruction:

'Every homicide is presumed unlawful, so that when the mere act of killing is proved, without any more being shown, the killing is presumed to be intentional and malicious and prompted by the ordinary and natural operations of the mind.'"
(See p. 36, certified copy of Appellant's Brief)

"31. The court erred in refusing and failing to properly instruct the jury that the burden rested upon

the state to establish beyond a reasonable doubt every essential element and ingredient of the offense charged against the defendant and every essential element and ingredient of the offenses lesser in degree that were submitted to the jury, on the grounds contained in the record, as indicated." (See p. 36, certified copy of Appellant's Brief)

"27. The court erred in refusing and failing to properly instruct the jury that the burden rested upon the state to establish beyond a reasonable doubt that the 'killing' was not excusable or justifiable, on the grounds contained in the record, as indicated." (See p. 35, certified copy of Appellant's Brief)

See also the language used at pages 39, 61 and 122 of petitioner's brief to the State Supreme Court, in addition to the language used at pages 26-27 and 36 of petitioner's Application for Rehearing addressed to that court, at which pages references are made to violations of federal constitutional rights.

It should be here and now noted that the exceptions taken in trial court followed by the presentation of the above questions and assignments to the State Supreme Court were all in accordance with Minnesota law. The silence of the State Supreme Court in evading any and all reference to constitutional issues, and in "sweeping them under the rug," should not be construed as an indication that these issues were not timely presented to that court. Even had exceptions not been preserved in the trial court, it has been held that in a criminal case, the Minnesota Supreme Court is bound to examine the entire record and to render judgment thereon and is under a duty to decide any and all issues presented by the record, even if those issues are not properly raised to it by appropriate questions and assignments, of error. *State v. Kasal,* 176 Minn. 86, 222 N. W. 575; *State v. Sieb-*

ke, 216 Minn. 181, 12 N. W. 2d 186; *State v. Hughes,* 157 Minn. 503, 195 N. W. 635.

More specifically, the Minnesota Supreme Court has ruled that federal constitutional rights can be asserted to it on appeal even if those rights have not been asserted in the trial court, and has in accordance with federal constitutional doctrine voided a state statute on the grounds that it was too vague and indefinite in a case where the alleged vagueness and indefiniteness were asserted for the first time in the case on the appeal thereof. *State v. Parker,* 183 Minn. 588, 237 N. W. 409. (This case has been interpreted as holding that both state and federal constitutional rights can be asserted on appeal for the first time. See *State v. Hayes,* 244 Minn. 296, 298, 70 N. W. 2d 110, 112 where *Parker* is construed as having held that a statute must be reasonably explicit to satisfy "the due process clauses"; and, of course, as we have indicated, the rights under both the state and federal constitution were asserted in *Parker* for the first time on the appeal).

The Supreme Court of the United States is not precluded from enforcing federal constitutional rights by the silence and evasion of a state court.

> "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." *Rogers v. Alabama,* 192 U. S. 226, 230, 48 L. Ed. 417, 418-419.

In the instant case, the opinion of the Minnesota Supreme Court discusses at some length petitioner's assignment of error No. 1 above (79 N. W. (2d) at 680, Appendix A. *infra,* p. 3a), and dispenses in rather cavalier fashion with "Assignments of Error 27 through 35" (79 N. W. 2d at 682, Appendix A, *infra,* p. 8a), which included,

of course, Assignments of Error Nos. 29, 31 and 27 as quoted above. Nowhere does that court purport to discuss the Constitution of the United States or the federal constitutional questions that were timely preserved and presented to it, although it claims to have considered and decided all questions raised. Notwithstanding the evasion of all federal questions presented, the non-federal grounds upon which the case was decided are clearly untenable and inadequate to sustain the judgment herein, for reasons upon which we elaborate in the Reasons for Granting the Writ section of this petition.

REASONS FOR GRANTING THE WRIT

This case involves important and novel federal constitutional questions concerning the administration of criminal justice in a state court. With respect to each of the three questions raised in this petition, it may safely be said that "a state court has decided a federal question of substance not theretofore determined by this court"—United States Supreme Court Rule 19. 1.(a). May we respectfully suggest that the state court has erroneously decided the federal questions we have raised in a manner inconsistent and in conflict with the requirements of the due process clause and the equal protection clause of Amendment XIV of the Constitution of the United States.

I. Discussion Of Question I Raised In This Petition.

A. The State Court Denied This Petitioner Due Process Of Law And The Equal Protection Of The Laws Under Amendment XIV Of The Constitution Of The United States By Arbitrarily Discriminating Against Him.

Counsel for petitioner sought to take depositions from ten named individuals by filing a motion with the court invoking therein *M. S. A.* §611.08 (R. 3-4) and showed cause in accordance with that statute by filing a supporting affidavit signed by both counsel (R. 4-10). Counsel's affidavit as to the necessity of the taking of the depositions and their prospective importance to them in the preparation of the case must be taken at face value. Cf. *Jones v. Commonwealth*, 97 Fed. 2d 335 (6th Cir.) where it was held to be a denial of due process for the trial court to give defense counsel in a murder trial an abbreviated period of time in which to prepare when he had submitted a motion for continuance accompanied by supporting affidavits showing his inability to prepare adequately in the time allotted him.

In the instant case neither was there any contravention of the showing made for the necessity of the depositions (R. 10-17), nor did either the trial court (R. 19-20) or the State Supreme Court (Appendix A, *infra*, p. 1a; Appendix B, *infra*, p. 10a) adversely hold that sufficient cause was not shown. Therefore, for the purpose of the issues raised in this petition, *it must be assumed as a matter of law that sufficient cause was shown to invoke under M. S. A. §611.08 the right to take depositions.*

One of the tests that has been laid down by the United State Supreme Court for determining when there has been a violation of the constitutional guarantee of equal protection

of the laws was pronounced in *Howard v. Commonwealth of Kentucky*, 200 U. S. 164, 50 L. Ed. 421. There, in holding adversely to petitioner's claim that equal protection had been denied to him in the state proceedings, the Court at 200 U. S. 176, 50 L. Ed. 426 explained thusly:

> "The [Kentucky] court, in its construction of §281, followed the construction established by prior cases, and did not make a discriminating application of that section against plaintiff in error. He was, therefore, not deprived of the equal protection of the laws."

Thus, by clear inference, the federally protected right to equal protection can be violated by an arbitrary and discriminatory application of state law.

In the instant case, petitioner sought to exercise his right to take pre-trial depositions of the individuals named in his moving papers by invoking *M. S. A.* §611.08, the relevant text of which reads as follows:

> "DEPOSITIONS FOR ACCUSED. *Upon cause shown* to the court in which any criminal action is pending, a judge thereof may by order allow depositions of witnesses on behalf of the prisoner *to be taken in the same manner and in like cases where they may be taken in civil actions.*" (Emphasis supplied)

The right to take depositions in civil actions in Minnesota was then embraced, as it still is, in Rule 26 of the Rules of Civil Procedure for the District Courts of Minnesota (for text of Rules, see Vol. 232, Minnesota Reports) which rules were promulgated pursuant to the enabling act embraced in *Laws of Minnesota* 1947, Ch. 498, *M. S. A.* §480.051 *et seq.*:

> "26.01. *When Deposition May be Taken.*
> Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the pur-

> pose of discovery or for use as evidence in the action or for both purposes * * * Depositions shall be taken only in accordance with these rules * * *"

The statutory language quoted above from *M. S. A.* §611.08 has been on the books in Minnesota since 1876 in the above quoted form, verbatim. See *Laws of Minnesota,* 1876, Ch. 57, §1. Nevertheless, the lower court chose to hold that it had no discretion to permit pre-trial depositions to be taken even upon cause shown (R. 19-20), and was upheld in its refusal to exercise any discretion by the State Supreme Court (see footnote 3, 79 N. W. 2d at 680, Appendix A., *infra,* p. 4a).

By way of stating our conclusion before proceeding to prove it, we say flatly that the State Supreme Court was demonstrably wrong and arbitrary in its holding. Prior to the ruling in this case, every criminal defendant in the history of the State of Minnesota since 1876 has had the right upon cause shown to take pre-trial depositions "in the same manner and in like cases where they may be taken in civil actions"—*M. S. A.* §611.08. The State Supreme Court, while recognizing that pre-trial depositions may be taken in civil actions in Minnesota in accordance with Rule 26, *et seq.,* nevertheless arbitrarily held that this petitioner could not take them in a criminal matter within the limitations set forth in that rule, the above statute *(M. S. A.* §611.08) notwithstanding. This holding, by the test of *Howard v. Commonwealth of Kentucky, supra,* arbitrarily caused this petitioner to become the first criminal defendant in Minnesota in the past three-quarters of a century and more to be denied the rights that were and are his under *M. S. A.* § 611.08.

Apart from *Howard v. Commonwealth of Kentucky, supra,* many other cases can be cited for the proposition

that an arbitrary application by a state of its own statutory law can result in a violation of the equal protection clause.

Thus, despite the fact that it is settled law that federal due process does not include the right to a state appellate review of a state court conviction in the absence of a state statute providing therefor, *Reetz v. Michigan,* 184 U. S. 505, 47 L. Ed. 563; *Griffin v. Illinois,* 351 U. S. 12, 21, 100 L. Ed. 891, 900, nevertheless is equally settled law that when state law does provide for appellate review, there must be no discrimination by a state to preclude a defendant from taking an appeal as provided for under such state law. *Dowd v. United States,* 340 U. S. 206, 95 L. Ed. 215; *Cochran v. Kansas,* 316 U. S. 255, 86 L. Ed. 1453; *Griffin v. Illinois, supra; Ortega v. Ragen,* 216 Fed. 2d 561, 563 (7th Cir.)

Each of the above cited cases makes it clear that a discriminatory denial to a defendant of his right to appeal a conviction in a state court is a denial to him of the equal protection of the laws under Amendment XIV, whether such discrimination arises from the fact of his being impoverished and unable to afford a transcript, as in *Griffin,* or whether such discrimination results from other factors as in *Dowd* or *Cochran.* The opinion of the court in the *Griffin* case seems to hold that due process is transgressed, as well as equal protection, when a criminal defendant is arbitrarily discriminated against in the manner we have indicated, even though such defendant is asserting rights under a state statute which rights in and of themselves are not a part of federal due process.

We think that an excellent argument can be made to the effect that the right of a criminal defendant to take pre-trial depositions is and should be part of his federally

protected right to due process in a state court proceeding. We further think that an equally good or better argument can be made that a denial to a criminal defendant of rights respecting depositions that are available to civil litigants in his state is so arbitrary and unreasonable a differentiation and classification that the equal protection clause of Amendment XIV is violated.[1]

But even if we are wrong in these contentions, which we wish to preserve for our brief and oral argument if this petition is granted, in view of *Griffin, supra,* and the other cases cited, it still does not mean that the State of Minnesota is free to treat in an arbitrary and capricious manner its statutes which on the face of them grant the right to a criminal defendant to take depositions. Even if that right is not a part of due process or of equal protection, in accordance with *Griffin, supra,* and the other cases cited, the right not to have state authorities, whether administrative or judicial, arbitrarily negate a clearly defined statutory right to take depositions is protected by both federal constitutional clauses.

See also *Hysler v. Florida,* 315 U. S. 411, 422, 86 L. Ed. 932, 939:

> "Petitioner also claims that Florida has denied him the equal protection of its law. This contention is plainly without substance. If Hysler had been singled out for invidious treatment by the Florida Supreme Court, he could properly complain here."

We think we are "properly complaining here." Our contention is that the treatment afforded this petitioner by the Minnesota Supreme Court, whether deliberately invidious or not, had the effect of singling him out as the first

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[1] *Minder v. Georgia,* 183 U. S. 559, 46 L. Ed. 328 even if still good law, is readily distinguishable.

criminal defendant who, during the long lifetime of *M. S. A.* §611.08, has been denied the opportunity to take depositions in accordance with that statute, despite his showing of proper cause thereunder. We claim that this flagrant abuse brings this petitioner within the equal protection and due process clauses.

For a detailed account of the arbitrary discrimination that was present in this case, we refer this Court to pages 1 to 14 of the Application for Rehearing to the Minnesota Supreme Court, which is a part of the official record below. By way of resume here, it was there demonstrated conclusively:

1. That *M. S. A.* §611.08 is and always has been a valid law, the relevant language having been enacted in 1876.

2. That *M. S. A.* §611.08 is the only provision in Minnesota law affording a criminal defendant the right to take depositions.

3. That until January 1, 1952 when the Rules of Civil Procedure for the District Courts of Minnesota took effect, the only source from which *M. S. A.* §611.08 derived its life and purpose was the several statutes providing for the taking of depositions *exclusively in civil cases.* These statutes were first enacted in 1851 (See Ch. 95, Rev. Stat. of Territory of Minnesota, 1851) and continued without material change through *M. S. A.* §597.01.

4. That Rule 26 is now and has been since January 1, 1952, the *only* source of the right in the State of Minnesota to take depositions in civil matters and has superseded *M. S. A.* §597.01, which latter section is no longer law.

5. That Rule 26, which applies to civil actions, of necessity supersedes *M. S. A.* §597.01 not only for the purpose of civil suits, but also for the purpose of determining the scope of *M. S. A.* §611.08, which

defines a criminal defendant's right to take depositions.

6. That because Rule 26 has superseded statutes that by their very terms purported to apply exclusively to civil actions, the Minnesota Supreme Court was arbitrarily in error in ruling that even though *M. S. A.* §611.08 is properly invoked by an accused, the Rules of Civil Procedure dealing with the taking of pre-trial depositions apply exclusively to civil matters and therefore cannot be adopted by *M. S. A.* §611.08.

The question of whether *M. S. A.* §611.08, which adopted civil procedure relative to the taking of depositions, refers to the civil procedure at the time of its enactment in 1876, or whether it was the intent of the legislature to adopt the civil procedure existing at such future time as the statute is sought to be invoked in a particular case, has been settled without equivocation countrywide.

> "But when the adopting statute makes no reference to any particular statute or part of statute by its title or otherwise, but refers to the law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of the adopting act but also all subsequent laws on the particular subject referred to, so far at least as they are consistent with the adopting act."
> 50 *Am. Jur., Statutes,* §39, p. 59

> "Reference in an adopting statute to the law generally on a particular subject gives rise to the presumption that the legislative intent was to include any subsequent modification or repeal of the adopted law, so that the incorporation is regarded to be the state of the adopted law at the time that the adopting statute is invoked."
> 168 *A. L. R.* 627, 636

Here, the adopting statute is, of course, *M. S. A.* §611.08. It is unquestionably clear that this statute, by the

rules as set forth in *Am. Jur.* and *A. L. R. supra,* specifically gave petitioner the right to take depositions as provided by law "at the time that the adopting statute is invoked". 168 *A. L. R.,* 636, *supra.* The Minnesota Supreme Court expressly recognized the validity of this rule as set forth here, and did not purport to say that Minnesota holds otherwise. 79 N. W. 2d at 638, App. A. *infra,* page 5a. Nevertheless, in a manner inconsistent with the federal constitutional rights of petitioner, the court achieved a result contrary to this rule. Petitioner was arbitrarily discriminated against.

On the basis of the foregoing, it must be concluded that so serious a question exists as to whether arbitrary discrimination in a state court violated petitioner's federally protected constitutional rights, that this petition should be granted.

B. The Refusal To Permit Depositions To Be Taken In Accordance With Petitioner's Constitutional Rights Resulted In Substantial Prejudice In This Specific Case.

Our whole argument on the subject of depositions need not be rooted in theoretical speculation that perhaps something of importance to petitioner might have been uncovered had the depositions been taken. The refusal in this specific case to grant petitioner the right to take depositions from the persons named in his motion resulted in material and undeniable harm to him, and this fact can be demonstrated readily.

One of the individuals of whom the petitioner desired to take a pre-trial discovery deposition was Donald V. Newton, who was the deceased's brother-in-law (R. 8). Having been denied means of securing by deposition in advance of trial

whatever pertinent facts regarding the deceased that were in Newton's possession, petitioner had no alternative but to call him as petitioner's witness during the trial (R. 1536; 1544), without knowledge of what his testimony might be. After answering some preliminary questions Newton was then asked the following questions and made the following answers:

> "By Mr. Goff:
>
> Q. Did you work on Thursday, April 21, at the Waterman-Waterbury Company, April 21 of this year, between 4:15 o'clock in the afternoon until 12:45 o'clock a. m. on Friday, April 22?
>
> A. *I refuse to answer that on the ground it might incriminate me. In other words, I will not serve the purpose of defense for bringing out points that might shatter this case.*
>
> Q. I will ask you, Mr. Newton, whether you worked your daily hourly schedule, commencing with 4:15 o'clock p. m. on Friday, April the twenty-second, up to 12:45 o'clock a. m. on Saturday, April 23?"
>
> * * * * *
>
> "The Witness: *I refuse to answer that on the grounds it might incriminate me*" (R. 1542-1543).

It was conceded by the prosecution and the petitioner that if a homicide was committed, it was committed on the night of April 22, 1955 or in the early morning hours of April 23, 1955 (R. 1253, 1097, 197-199).

Whether Newton was in the deceased's company or in the company of someone who was, or whether he saw her the night of April 22nd or the morning of April 23rd, or knew of someone who did, remains a mystery so far as the record of this trial is concerned. The nature of his answers to the questions propounded can lead one only to the conclusion that he possessed pertinent facts that could have exonerated petitioner.

On the witness stand Newton was in the glare of publicity before a judge, jury and crowded courtroom. *Is it not very likely that in the privacy of pre-trial deposition proceedings he would have disclosed his apparent knowledge of the true circumstances of the deceased's death, which might well have exculpated petitioner?* It must be remembered that the trial court refused to call Newton as the court's witness (R. 39-94; 177,178; 617; 621-624; 1048-1053); that the trial court further refused to permit petitioner to cross-examine Newton as a hostile witness, notwithstanding the fact that the trial court conceded the fact of the hostility (R. 624-625; 1053; 1544). *Petitioner was thus hopelessly left with no recourse but to call Newton as petitioner's own witness (R. 1536), without leave to cross-examine him (R. 1544).*

At a pre-trial deposition Newton could have been cross-examined and otherwise interrogated in such fashion that he undoubtedly would have been induced to give leads as to his whereabouts on the night the deceased died, or as to his apparent knowledge of the circumstances of her death *"which would serve the purpose of defense for bringing out points that might shatter this case"* (R. 1543). Certainly it is probable that *at least some leads* might have been developed from him beneficial to petitioner.

II. Discussion Of Question II Raised In This Petition.

The trial court twice instructed the jury as follows:

> "Every homicide is presumed unlawful, so that when the mere act of killing is proved, without any more being shown, the killing is presumed to be intentional and malicious and prompted by the ordinary and natural operations of the mind" (R. 1727; 1763).

An exception was duly taken by petitioner to this instruction (R. 1738; 1771).

The question here is simply whether or not such an instruction violated petitioner's right to due process of law under Amendment XIV of the Constitution of the United States.

The conclusion is and must be that the giving of this instruction was gross error[2] to the point of depriving petitioner of due process of law.

The effect of the instruction in question was that in one blow it completely disintegrated the presumption of innocence to which petitioner was constitutionally entitled. An additional result of the instruction was that it effectively and erroneously made it unnecessary for the prosecution to prove each essential element of the crime charged in the indictment or of the crime for which petitioner was convicted.

No presumption of illegality can constitutionally attach to an otherwise legally neuter act. For all purposes here, we can consider the above instruction and the "presumption" embraced therein as if they were embodied in Minnesota statutory law. We cite this Court to *Manley v. Georgia,* 279 U. S. 1, 73 L. Ed. 575. It was there held that an arbitrary presumption contained in a state statute dealing with bank insolvencies was in conflict with the federal due process clause. The statute there purported to declare bank

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[2] See *M. S. A.* Sec. 619.05:

"HOMICIDE CLASSIFIED. Homicide is the killing of a human being by the act, procurement, or omission of another, and is *either* (1) murder; (2) manslaughter; (3) excusable homicide; or (4) justifiable homicide." (Emphasis supplied).

It is abundantly clear that in view of the fact that some homicides are unlawful and some are not, there is no room under Minnesota law for the operation of any presumption of illegality. This point was argued at considerable length with extensive citations of case law in petitioner's brief to the State Supreme Court.

insolvencies presumptively fraudulent, and to render the president and directors presumptively criminally responsible for same.

It no more follows logically that when a homicide is an accomplished fact that someone is criminally responsible than it follows logically that when a bank goes "bust" that its directors have been thieves. Standing alone, a homicide, like a bank failure, is a legally neuter event. See, *e.g.*, *Black's Law Dictionary*, 4th Ed., p. 867 (1951); *Words and Phrases*, Vol. 19, p. 631, *et seq.* (1940). *The commission of a homicide is not, nor may it be judicially declared to be, a crime under Minnesota law. M. S. A.* §619.05, *supra.* A homicide under the law of that state *becomes* unlawful only when committed under certain circumstances as defined by statute.[3] Due process of law affords no room for the operation of presumptions which, in a case such as this, would relieve the state of the burden of proving beyond a reasonable doubt each and all of the essential elements of the crime charged or of the lesser offenses included therein and submitted to a jury, or which would in effect cast a burden on a defendant to prove his own innocence.

See the following language at *State v. Kelly*, 218 Minn. 247, 257-258, 15 N. W. 2d 554, 560 where the court

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[3] To substantiate the validity of the above statement, we here cite to the Minnesota homicide statutes here relevant:

619.05, *supra*, HOMICIDE CLASSIFIED.
619.07 MURDER IN FIRST DEGREE.
619.08 MURDER IN SECOND DEGREE.
619.13 MANSLAUGHTER.
619.15 MANSLAUGHTER IN FIRST DEGREE.
619.18 MANSLAUGHTER IN SECOND DEGREE.
619.27 EXCUSABLE.
619.29 HOMICIDE BY OTHER PERSON, JUSTIFIABLE WHEN.
610.05 DEFENSE OF SELF OR ANOTHER, WHEN JUSTIFIABLE.

quotes with approval from *Tot v. United States,* 319 U. S. 463, 87 L. Ed. 1519, 1527:

> " '* * * a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which, of course, constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observances cannot be sustained.' "

The Minnesota court continued immediately after the above quoted language as follows:

> " '* * * There is beyond controversy a reason for imposing limitations in criminal prosecutions which has no existence in civil cases. One accused of a criminal act is presumed to be innocent in the absence of any evidence of his guilt and we apprehend that this presumption is one protected by the fundamental law from each state or legislative district. If so, *the courts must not permit it to be indirectly destroyed by declaring certain facts to be prima facie evidence of guilt, when those facts are neither criminal in themselves nor indicative of the existence of any criminal act or intent.*'
>
> "It has well been stated that 'presumptions of law —at the best uncertain instruments in the investigation and discovery of truth—are especially dangerous in the administration of criminal justice when used to control or impair the natural fundamental presumption of innocence, their effect being to give to evidence a technical probative force beyond that which it would naturally and ordinarily possess in producing conviction in the minds of the jury.' " (Emphasis supplied.)

See also the following pertinent language:

> "The power [of a state] to create presumptions is not a means of escape from constitutional restrictions."

Bailey v. Alabama, 219 U. S. 219, 239, 55 L. Ed. 191, 200.
See also *State v. Griffin,* 154 N. C. 611, 70 S. E. 292.

That the presumption of innocence is universally considered to be a federally protected constitutional right cannot be seriously open to question. See, *e.g., State v. Kelly, supra,* 218 Minn. at 257, 15 N. W. 2d at 560:

> "but also such fundamental rights as the presumption of innocence and proof beyond a reasonable doubt, which, though not expressly enumerated therein, are as much a part of the constitution as though expressly set out."

A failure to instruct on the presumption of innocence in the federal system or even the giving of murky or inconsistent instructions tending to dilute that presumption has long been deemed to be reversible error. *Drossos v. United States,* 2 F. 2d 538 (8th Cir.); *Dodson v. United States,* 23 F. 2d 401 (4th Cir.); *Nicola v. United States,* 72 F. 2d 780 (3rd Cir.).

The presumption of innocence has long been a fundamental principle embodied in the administration of criminal law in both federal and state courts, including Minnesota.[4] See the following statement at *Coffin v. United States,* 156 U. S. 432, 453, 39 L. Ed. 481, 491:

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[4] See *State v. Sailor,* 130 Minn. 84, 153 N. W. 271 where it was held that the refusal to give an instruction on presumption of innocence constitutes reversible error even if a charge is given upon proof beyond a reasonable doubt. See also *M. S. A.* Sec. 611.02:

"PRESUMPTION OF INNOCENCE; CONVICTION OF LOWEST DEGREE, WHEN. Every defendant in a criminal action is presumed innocent until the contrary is proved, and, in case of a reasonable doubt, is entitled to acquittal; and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest."

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.
>
> "It is stated as unquestioned in the textbooks and has been referred to as a matter of course in the decisions of this court and in the courts of the several states."

We submit that this Court should grant the requested writ to enable petitioner to brief and argue the important constitutional question of whether an instruction that in effect negatives the presumption of innocence in a state court does not, in fact, deny federal due process of law. Although not all safeguards basic and fundamental in the federal system are constitutionally imposed on state courts, we believe that the right not to have the presumption of innocence negated is so basic that it is and should be a federally protected constitutional right.

III. Discussion Of Question III Raised In This Petition.

One of the requested instructions submitted to the trial court by petitioner was as follows:

> "If the court should submit to the jury any offenses lesser in degree than murder in the first degree, then that the Court should, in addition to the ingredients set forth in the above paragraph, instruct the jury on each and all of the essential ingredients of each of the offenses so submitted lesser in degree and instruct the jury that each and all of such ingredients must be proved by the prosecution beyond a reasonable doubt" (R. 1789, 1695).

In another requested instruction, petitioner requested that the jury be charged that before it could convict for

murder in the first degree, it be instructed that it must find beyond a reasonable doubt that there was *no excuse or justification* for the commission of the homicide (R. 1788). This request had been set forth in the paragraph preceding the first quoted instruction (R. 1788-1789) above so that the record clearly indicates that the court had been requested to instruct that the jury must find beyond a reasonable doubt that there was *no excuse or justification* for the homicide before it could convict for any offense, including offenses lesser than first degree murder.

The court refused to instruct on the essential ingredients of any of the lesser offenses submitted and refused to instruct that each of the ingredients of said lesser offenses must be proved by the prosecution beyond a reasonable doubt (R. 1716-1737; 1751-1776). The only instruction given by the trial court that did indicate the burden of proof on the prosecution was as follows:

> "The state has the burden to prove beyond a reasonable doubt all of the essential ingredients *of the charge that is made.*" (R. 1718; 1754) (Emphasis supplied.)

The charge that was made in the indictment and to which the court was then referring was *murder in the first degree* (R. 1, 2). The court submitted to the jury as possible alternative verdicts first degree murder, second degree murder, first degree manslaughter and second degree manslaughter (R. 1726-1732; 1762-1765). Petitioner was convicted of first degree manslaughter (R. 1771). Minnesota Statutes define manslaughter thusly:

M. S. A. §619.13:

> "MANSLAUGHTER. *In every case* other than murder in the first, second and third degrees, as in this chapter defined, *homicide not excusable or justifiable* is manslaughter." (Emphasis supplied.)

M. S. A. §619.15:

"MANSLAUGHTER IN FIRST DEGREE. Such homicide is manslaughter in the first degree when committed without a design to effect death:

* * * * *

"(2) In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon,"

* * * * *

M. S. A. §619.18:

"MANSLAUGHTER IN SECOND DEGREE. Such homicide is manslaughter in the second degree when committed without a design to effect death:

* * * * *

"(2) In the heat of passion, but not by a deadly weapon or by use of means either cruel or unusual;"

* * * * *

Thus, by the very terms of the statutes, an essential ingredient of the state's case and one on which it had the burden of proving beyond a reasonable doubt was that the homicide was *neither excusable nor justifiable* before a manslaughter conviction could be rendered. Notwithstanding the request duly made by petitioner that we have referred to above, *the jury was never informed that a condition precedent to a manslaughter conviction was the negativing of excuse or justification and was further never informed that the prosecution had the burden of so negativing these factors beyond a reasonable doubt* (R. 1716-1737; 1751-1770).

Much of what we have said in our discussion of Question II raised in this petition is applicable here. Just as it is reversible error in the federal system to negate or dilute the presumption of innocence, so it is reversible error in the

federal system to shift the burden of proof on to the defendant in any material particular. *E.g., Drossos v. United States, supra.* Parenthetically, we suggest that one of the effects of the instruction that "every homicide is presumed unlawful, etc.", discussed earlier in this petition, is to shift onto the defendant the burden of proving that there was no excuse or justification, the negativing of each of which was a part of the prosecution's burden as to both the offense charged and the offense for which petitioner was convicted.

It further follows, or should follow, that a gross error in the shifting of the burden of proof onto a criminal defendant as to such material particulars is constitutionally objectionable under the due process clause of Amendment XIV. That which is not countenanced in the federal system on so grave and basic a matter should not, under these circumstances, be permitted in the state courts. The supreme law of the land demands uniformity in both state and federal courts on fundamental matters linked to the inherent fairness of the administration of criminal justice. The State of Minnesota so recognizes.[5]

This petition should be granted to enable petitioner to brief and argue this vital constitutional question.

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5 See the language of former Minnesota Chief Justice Loring in *State v. Schabert*, 218 Minn. 1, 7, 15 N. W. 2d 585, 588, where it is indicated that Minnesota stands, ordinarily, willing and ready to be bound by decisions of the United States Supreme Court relative to the administration of criminal justice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 98 Hennepin County

Dell, C. J.
Took no part, Murphy, J.

Endorsed
Filed November 15, 1956
Frank Larkin, Clerk
Minnesota Supreme Court

State of Minnesota,

Respondent,

36807 vs.

A. Arnold Axilrod,

Appellant.

SYLLABUS

1. While a defendant may have a right to take and use depositions in a criminal proceeding, the source of the right, if there is any, is not to be found in the rules of civil procedure. Consequently, the deposition-discovery device, which is authorized only under the rules of civil procedure, is not available in criminal cases.

2. The attendant publicity and certain remarks of the trial judge and prosecuting attorney did not prejudice the defendant to the extent of depriving him of a fair and impartial trial.

3. Since the propriety of permitting leading questions on direct examination depends upon the particular circumstances of each case, the determination rests largely in the discretion of the trial court. *Held*, under the circumstances of this case, the trial court did not commit reversible error by failing to call a certain witness on its own initiative or in refusing to permit the defendant to ask the witness leading questions on direct examination.

4. The trial court did not err in allowing evidence as to a witness' reputation for truth and veracity where the impeaching testimony was based upon a relatively brief period of time and confined primarily to the community in which

the witness worked rather than that in which he actually resided.

5. Upon consideration of the evidence, *held* that it is amply sufficient to sustain the verdict of conviction.

6. *Held* that the instructions, viewed in their entirety, adequately and fairly explained the law of the case.

7. Other assignments of error considered and found to be without merit.

Affirmed.

OPINION

DELL, Chief Justice.

Defendant was indicted by the grand jury of Hennepin County on a charge of murder in the first degree. He entered a plea of not guilty, was tried by a jury and found guilty of manslaughter in the first degree. He appeals from the judgment of conviction.

On the morning of April 23, 1955, the dead body of a 21-year-old girl was found in an alley in Minneapolis. There was considerable expert testimony that death resulted from manual strangulation. An autopsy revealed that the deceased was about three and one-half months pregnant. It also revealed evidence of sexual intercourse shortly before her death. Although married, the deceased had not seen her husband, who was in military service overseas, for over a year. For some four months prior to her death, she had been living with her father in Minneapolis.

The defendant, a married man 50 years of age, was a dentist practicing in Minneapolis. There was evidence that the deceased was a patient of the defendant; that he had on two occasions brought her home apparently under the influence of sedatives; that the deceased had accused the defendant of being responsible for her pregnancy; that on one occasion, about a month before her death, she had stated to him at his office "You know that pill you gave me

and now I am pregnant"; that during the investigation he first stated that he had not seen the deceased for several days, probably a week, before her death and that she had not been in his automobile the night before the body was found but later said "I guess there is no need to beat any longer behind the bush" and admitted that he had treated the deceased the evening before the body was discovered and had discussed the matter of her pregnancy; that on that same night they had left the defendant's office together and had driven around in defendant's automobile in the vicinity in which the body was found; that during this ride the deceased became insistent and "accusing" and threatened to expose the defendant to the world; that this caused the defendant to become very angry and he told the officials investigating the death that he "blacked out," recovering to find himself alone in the car. There was other evidence of statements by the defendant that the jury was justified in construing as admissions of assault upon the deceased.

The defendant, in an unnecessarily long, 257-page brief, lists 37 assignments of error, states 19 points to his argument, and sets forth 4 legal issues or questions as being involved.

1. Defendant's first assignment of error relates to the contention that the trial court erred to defendant's substantial prejudice in denying his motion for an order permitting him to take "discovery depositions," in the manner provided by the rules of civil procedure, of persons alleged to have knowledge of relevant facts. The motion was denied on the ground that depositions for discovery purposes are authorized only in civil cases and are not available in criminal cases.

The deposition-discovery device was first authorized in this state under the rules of civil procedure, effective January 1, 1952.[1]

[1] Rule 26, et seq., Rules of Civil Procedure, See, Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 Minn. L. Rev. 633.

The statute under which the rules of civil procedure were promulgated provides in part:

> "The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof *in civil actions* * * *."[2] (Italics supplied.)

In defining the scope of the rules, Rule 1, Rules of Civil Procedure, provides in part:

> "These rules govern the procedure in the district courts of the state of Minnesota *in all suits of a civil nature.* * * *." (Italics supplied.)

Nevertheless, defendant contends that by virtue of *M. S. A.* 611.08 the deposition-discovery device of the rules of civil procedure applies in criminal cases as well as in civil actions. Section 611.08 provides in part:

> "Upon cause shown to the court in which any criminal action is pending, a judge thereof may by order allow depositions of witnesses on behalf of the prisoner to be taken in the same manner and in like cases where they may be taken in civil actions. The depositions so taken may be used upon the trial of the defendant, in his behalf, as depositions are now allowed and used in civil actions."[3]

At the time of the enactment of this section in 1876,[4] depositions could be taken in civil actions only for the purpose of obtaining evidence for use at the trial where a witness, because of certain specified reasons, was unable to

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[2] *M. S. A.* 480.051.

[3] While permission to take depositions under this statute is discretionary, the trial court in the instant case did not exercise any discretion. It based its ruling solely on the inapplicability of the rules of civil procedure in criminal cases.

[4] L. 1876, c. 57, Sec. 1.

appear, or for the perpetuation of testimony.[5] However, defendant points out that, where a statute adopts the law generally relating to a subject matter, it adopts that law as it exists from time to time and not as it exists at the time the adopting statute is enacted.[6] He concludes, therefore, that §611.08 incorporates the deposition-discovery mechanism now provided for in the rules of civil procedure even though depositions for discovery purposes were not permitted at the time §611.08 was enacted.

Even if we were to assume that the legislature, in enacting §611.08, intended that depositions should be permitted in criminal cases to the same extent that they might subsequently be permitted in civil cases,[7] we cannot agree with defendant's conclusion. Regardless of existing statutes, there is nothing to prevent the legislature from subsequently enacting laws to apply *exclusively* to procedure in civil cases or to authorize the promulgation of rules of procedure exclusively for civil cases. *M. S. A.* 480.051 clearly limits the authority of this court to the promulgation of rules governing civil actions, and the rules themselves are specifically so limited in application.[8]

The right of a defendant in a criminal proceeding to take and use depositions under other existing statutes is not before us. It is sufficient that the source of the right, if there is any, is not to be found in the rules of civil procedure, and hence does not include the right to take depositions for discovery purposes.

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[5] Stat. at Large 1873, c. 41, Secs. 286 to 302; *M. S. A.* 1949, cc. 597, 598.

[6] 82 C. J. S., Statutes, Sec. 370, p. 848.

[7] The second sentence of Sec. 611.08 provides that depositions may be used "as depositions are *now* allowed and used in civil actions." (Italics supplied.) It is questionable whether the legislature would restrict the "use" of depositions to the civil practice then existing without intending to impose the same restriction on their "taking."

[8] Rule 1, Rules of Civil Procedure, See, also, Wright, Minnesota Rules, p. 1.

2. Assignments of Error 2 through 10 relate to the attendant publicity and certain remarks of the trial judge and the prosecuting attorney as prejudicing the defendant and denying him a fair and impartial trial. An examination of these contentions reveals no reversible error, and it would serve no useful purpose to comment on them.

3. Assignments of Error 3, 11 and 13 through 17 relate to the witness, Donald V. Newton. Defendant's primary contention is that the trial court erred in refusing to call Newton as a witness for the court and in not permitting defendant to ask him leading questions on direct examination. It is generally held that a trial court has no affirmative duty to call a witness on its own initiative.[9] However, where a witness is obviously hostile or unwilling, "leading questions" may be permitted for the purpose of eliciting facts[10] inasmuch as there is little, if any, danger of counsel effectively suggesting specific answers.[11] Since the propriety of allowing leading questions depends upon the particular circumstances of each case, the determination rests largely in the discretion of the trial court. As pointed out by Professor Wigmore (3 Wigmore, Evidence [3 Ed.] §770):

> "It follows, from the broad and flexible character of the controlling principle, that its application must rest largely, if not entirely, *in the hands of the trial court*. So much depends on the circumstances of each case, the demeanor of each witness, and the tenor of the preceding questions, that it would be unwise, if not impossible, to attempt in an appellate tribunal to consider each instance adequately."

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[9] 19 Dunnell, Dig. (3rd Ed.) Sec. 9721b; 9 Wigmore, Evidence (3rd Ed.) Sec. 2484. Compare dissenting opinion of Mr. Justice Frankfurter in *Johnson v. United States*, 333 U. S. 46, 54, 68 S. Ct. 391, 396, 92 L. Ed. 468, 475, to the effect that trial court has the *duty* to call and examine witnesses "before resorting to guesswork in establishing liability for fault."

[10] Defendant does not contend that he should have been permitted to cross-examine the witness for the purpose of impeachment.

[11] See, e. g., *Muenkel v. Muenkel*, 143 Minn. 29, 173 N. W. 184.

And in Usher v. Eckhardt, 176 Minn. 210, 214, 222 N. W. 924, 925, we said:

> "The control of a trial court over the matter of allowing leading questions is practically absolute; and it will only be in instances where the power has been grossly abused, resulting in a manifest miscarriage of justice, that a new trial will be granted. [Citing cases.]"

Although the trial court recognized that the witness Newton was "hostile," we can find no gross abuse of its wide discretion in refusing to permit counsel to ask leading questions under the circumstances of this case. Moreover, since the witness declined to give the desired information on constitutional grounds, we fail to see how defendant could have been prejudiced by the court's refusal to permit the questions in another form.

4. Assignments of Error 18 and 21 relate to certain impeaching evidence regarding the defendant's witness, Leonard Ugland. The state called two witnesses who testified that they had known Ugland for approximately five months; that they were familiar with his reputation as to truthfulness; that that reputation was bad; and that they would not believe him under oath. The defendant argues that, because the impeaching testimony was based upon a brief period of time and confined primarily to the community in which Ugland worked rather than that in which he lived, it should not have been permitted. First, the time involved was, in our opinion, sufficient for the persons testifying to have gained knowledge of Ugland's reputation. Second, in this state the restrictive concept of "community" is not followed, and the testimony may extend to the reputation of the witness for truth and veracity in the community where he works as well as that in which he has his home.[12]

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[12] See, *Simon v. Carroll*, 241 Minn. 211, 221, note 11, 62 N. W. 2d 822, 829, note 10, and authorities there cited; see, also, 36 Minn. L. Rev. 724, 732.

5. Assignments of Error 12, 22 through 25 and 36 relate to the sufficiency of the evidence. The evidence, as briefly summarized at the beginning of this opinion, amply sustains the verdict. There is no point in further analyzing it or in setting forth the details. Suffice to say the conviction was justified.

6. Assignments of Error 27 through 35 deal with the giving of and refusal to give certain instructions. In particular defendant argues that the court erred in refusing to instruct the jury that the burden rested upon the state to establish beyond a reasonable doubt that the killing was not excusable or justifiable. The court did instruct the jury that the state must prove the essential elements of the offense, one of which was that the killing was done without excuse or justification. Defendant, relying upon State v. McPherson, 114 Minn. 498, 131 N. W. 645, and State v. McGrath, 119 Minn. 321, 138 N. W. 310, contends that the failure of the court to amplify the instruction regarding the burden of proving that the homicide was without excuse or justification constitutes prejudicial error. In both of the cases relied upon the homicide was admitted and the sole question involved was whether the killing was without justification. In the instant case there was no controversy regarding excuse or justification, and the state's evidence in this regard was conclusive. While it would perhaps be more satisfactory for the trial courts to amplify their instructions on this element as indicated in the McPherson and McGrath cases, *supra*, we cannot say that the failure to do so under the particular circumstances of this case constituted prejudicial error.

No useful purpose would be served in extensively comparing the remainder of the instructions requested with those given. As we said in State v. Pankratz, 238 Minn. 517, 536, 57 N. W. 2d 635, 646:

> "* * * It was not necessary to give the law in the exact language of the request so long as the applicable law was correctly stated by the court in its charge."

Viewing the instructions in their entirety, as we must,[13] we find that they adequately and fairly explained the law of the case.

7. We have carefully examined and considered the other assignments of error and have reached the conclusion that no error of a prejudicial nature was committed.

Affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

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[13] See, *Cameron v. Evans*, 241 Minn. 200, 208, 62 N. W. 2d 793, 798; *Swanson v. LaFontaine*, 238 Minn. 460, 469, 57 N. W. 2d 262, 268.

APPENDIX B

No. 98 Hennepin County

Dell, C. J.
Took no part, Murphy, J.

Endorsed
Filed December 14, 1956
Mae Sherman, Clerk
Minnesota Supreme Court

State of Minnesota, Respondent,

36807 vs.

A. Arnold Axilrod, Appellant.

ON PETITION FOR REHEARING

DELL, Chief Judge.

A petition for rehearing has been filed by the appellant. The points raised in the petition were fully considered by the court and disposed of in the opinion heretofore filed. The petition must, therefore, be denied.

However, after reading the petition, we deem it advisable to correct what might be considered a misleading statement in the opinion. We said, in effect, that the trial court instructed the jury that the state must prove the essential elements of the offense, one of which was that the killing was done without excuse or justification. The trial court specifically so instructed the jury only with reference to the offense of murder in the first degree. The court then went on to point out the differences in the elements of lesser included offenses. Although perhaps not expressly spelled out, the instructions considered as a whole make it clear that the lack of "excuse or justification" element was also a necessary ingredient of the lesser offenses. If there was any technical error in the court's charge respecting this element, it was clearly error without prejudice since, as pointed out in the opinion the state's evidence established that the killing here was without excuse or justification.

Petition for rehearing denied.

MR. JUDGE MURPHY took no part in the consideration or decision of this case.

APPENDIX C

STATE OF MINNESOTA, SUPREME COURT

State of Minnesota,

Respondent,

36807 vs.

A. Arnold Axilrod,

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

Dated and signed December 26, 1956.

By the Court,

Attest: Mae Sherman, Clerk.

(Court Seal.)

APR 1 195
JOHN T. FEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1956
No. 831

A. ARNOLD AXILROD
Petitioner

vs.

STATE OF MINNESOTA
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

ON PETITION FOR A CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 831

A. ARNOLD AXILROD

Petitioner

vs.

STATE OF MINNESOTA

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

ON PETITION FOR A CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REFERENCE TO THE OFFICIAL OPINION OF THE COURT BELOW.

The decision in this case was handed down by the Supreme Court of the State of Minnesota on November 15, 1956. It is reported in 248 Minn. 204, 79 N. W. 2d 677.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Appellant attempts to invoke the Fourteenth Amendment. No showing is made that this petitioner has been denied due process. He had a fair hearing—a fair trial and that is all the Fourteenth Amendment requires.

STATEMENT OF FACTS

The petitioner, A. Arnold Axilrod, was indicted by a Grand Jury of Hennepin County, Minnesota, on the 2nd day of May, 1955. The charge against him was that of Murder in the First Degree. (See Indictment.)

On the 3rd day of May, 1955, the petitioner was arraigned in the District Court of Hennepin County, Minnesota, upon said Indictment and entered a plea of "Not Guilty". On September 19, 1955, the trial of said petitioner upon said Indictment was begun in the District Court of said County and State, and was concluded on November 1, 1955, and submitted to the jury, and on the said 1st day of November, 1955, the court gave its instructions to the jury and in its instructions the court submitted five possible verdicts: Murder in the First Degree, Murder in the Second Degree, Manslaughter in the First Degree, Manslaughter in the Second Degree and Not Guilty. On November 3, 1955, the petitioner was found guilty of Manslaughter in the First Degree.

The petition, commencing on page 3, pretends to set out certain matters pleaded in a Notice of Motion dated August 24, 1955, which Motion petitioner claims was made pursuant to *M. S. A.*, Sec. 611.08, and wherein petitioner moved the trial court for an order to permit his attorney to take pre-trial depositions on behalf of petitioner from ten named individuals, said depositions to be taken in the same manner as depositions are taken in civil actions under the rules of civil procedure for the District Court of the State of Minnesota (R. pp. 3-4). Thereafter petitioner claims that the relevant text of *M. S. A.*, Sec. 611.08 is as follows:

> "DEPOSITIONS FOR ACCUSED. Upon cause shown to the court in which any criminal action is pending, a judge thereof may by order allow deposi-

tions of witnesses on behalf of the prisoner to be taken *in the same manner and in like cases where they may be taken in civil actions.*" (Emphasis supplied.)

The statement by petitioner in respect to this motion is erroneous and in some respects misleading in that petitioner claims that his motion for pre-trial depositions were proposed to be taken pursuant to *M. S. A.*, Sec. 611.08. It is incomplete in that it pretends to set forth the relevant text of *M. S. A.*, Sec. 611.08, but fails to bring before this Court in connection therewith the relationship and history of *M. S. A.*, Sec. 611.08 and *M. S. A.*, Sec. 597.01.

The history of *M. S. A.*, Sec. 611.08 and *M. S. A.*, Sec. 597.01 will be discussed further in our argument relative to Question I raised in the petition.

The motion was denied on the ground that depositions for discovery purposes are authorized only in civil cases and are not available in criminal cases. (*State v. Axilrod, supra.*)

The instructions by the trial court to the jury were given in accordance with Minnesota law and criminal procedure and did not in any sense violate or involve the Fourteenth Amendment.

SUMMARY OF ARGUMENT

I.

The petitioner's rights under the Fourteenth Amendment have not been violated.

Frank v. Mangum, 237 U. S. 309, 340, 59 L. Ed. 969;

Snyder v. Commonwealth of Massachusetts, 291 U. S. 97;

Davis v. Texas, 139 U. S. 651;

Minder v. Georgia, 183 U. S. 559;

Beaupre v. Noyes, 138 U. S. 397.

II.

The due process clause in the Fourteenth Amendment to the constitution does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defendant against it.

Simon v. Craft, 182 U. S. 427.

III.

The provisions authorizing pre-trial discovery depositions in civil cases are not applicable to criminal proceedings under Minnesota law.

State v. Axilrod, supra.

IV.

The proceedings before the trial court including the court's instructions to the jury were fair, regular and in all things conforming to the laws of the State of Minnesota.

State v. Prolow, 98 Minn. 459, 461, 108 N. W. 873, 874;

State v. Brown, 12 Minn. 448 (538);

State v. Shippey, 10 Minn. 178 (273), 88 Am. Dec. 70;

State v. Hanley, 34 Minn. 430, 26 N. W. 397;

State v. Lautenschlager, 22 Minn. 514;

State v. Brown, 41 Minn. 319, 43 N. W. 69;

State v. Pankratz, 238 Minn. 517, 536, 57 N. W. 2d 635, 646;

Cameron v. Evans, 241 Minn. 200, 208, 62 N. W. 2d 793, 798;

Swanson v. LaFontaine, 238 Minn. 460, 469, 57 N. W. 2d 262, 268;

Vol. 19, *Mason's Dunnell Minn. Digest*, 3rd Ed., 196, note 2.

ARGUMENT

I.

The petitioner's rights under the Fourteenth Amendment have not been violated.

Under the due process clause, petitioner was not entitled to any particular procedure.

Frank v. Mangum, 237 U. S. 309, 340, 59 L. Ed. 969, quoting therefrom:

> "* * * the due process clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and hearing, or opportunity to be heard, before a competent tribunal are not interfered with."

II.

The due process clause in the Fourteenth Amendment to the Constitution does not necessitate that the proceedings in a state court should be of a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it.

In *Simon v. Craft*, 182 U. S. 427, 437, 45 L. Ed. 1165, Mr. Justice White said:

> "* * * If the essential requisites of full notice and an opportunity to defend were present, *this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case.*" (Emphasis supplied.)

III.

The provisions authorizing pre-trial discovery depositions in civil cases are not applicable to criminal proceedings under Minnesota law.

The State court did not deny the petitioner due process of law and the equal protection of the law under Amendment Fourteen of the Constitution of the United States by arbitrarily discriminating against him. His claim is that he sought to take depositions from ten named individuals by filing a motion with the court under *M. S. A.*, Sec. 611.08, accompanied by certain affidavits. The real facts are that counsel for petitioner did not seek to take depositions from ten named individuals in behalf of the petitioner as authorized by *M. S. A.*, Sec. 611.08, but attempted by an ingenious device to seek authority from the trial court to take "discovery depositions" for discovery purposes, a claimed right which is not authorized by the laws of the State of Minnesota in criminal cases and not authorized by *M. S. A.*, Sec. 611.08. By this ingenious device and argument petitioner sought to foist upon the State of Minnesota a right by a defendant to, in a criminal case, take discovery depositions. It now appears from the argument in his petition for certiorari under Question I that under this device and ingenious argument an attempt is made to indicate to the Supreme Court of the United States that a federal question is involved under a claim that petitioner's rights have been violated by a pretended interpretation of a law which is not a law. Even common sense tells us that mere words and expressions and arguments do not constitute laws. The words "Rules of Civil Procedure for the District Court of Minnesota" fully answer petitioner's question.

The petitioner was not denied any right under the Rules of Criminal Procedure for the District Court of Minnesota.

What petitioner was actually trying to accomplish was to cause the Supreme Court of the State of Minnesota to create and establish new criminal procedure not at this time authorized in any manner whatsoever by the legislature of the State of Minnesota. And the petitioner is now attempting to ask the Supreme Court of the United States of America to create new criminal procedure not at this time, nor at any time in the past, authorized by the legislature of the State of Minnesota.

The legislature of the State of Minnesota never intended that the Rules of Civil Procedure for the District Courts of Minnesota should apply to criminal actions and procedure. Indeed Chapter 498 of the *Laws of 1947* sets forth the purpose and intent of the legislature in the title of said chapter. The title reads: "An act authorizing the supreme court to regulate by rules the pleadings, practice and procedure in civil cases in all of the courts of this State." Please note that the title does not include criminal cases or criminal procedure and Section 1 of said chapter reads in part: "The supreme court of this state shall have the power to regulate the pleadings, practice, procedure and the forms thereof in civil actions in all courts of this state, etc." Again, please note that the legislature omitted criminal actions and criminal procedure. It is of course elementary that an enactment must be germane to the title of the act (*Minn. Con.*, Art. IV, Sec. 27). That under these circumstances, it is self-evident that the Legislature did not authorize nor intend to authorize the Supreme Court to promulgate rules covering criminal actions and procedure.

Mr. Charles Allen Wright, Associate Professor of Law, University of Minnesota, in his book entitled, "Minnesota Rules" defines the actions covered by the rules as follows (we quote from page 1):

"The enabling act under which the Minnesota Rules of Civil Procedure were promulgated provides that the rule-making power extends to 'civil actions'. Minn. Stat., Sec. 480.051, Rule 1 states that the Rules govern procedure 'in all suits of a civil nature' with the exceptions stated in Rule 81 and discussed under that Rule. That 'suits of a civil nature' means the same thing as does 'civil actions' is indicated by Rule 2, which provides that there is to be but one form of action to be known as 'civil action'."

"On the whole there is no difficulty in determining the scope of application of the Rules. Criminal proceedings are patently not civil actions. Indeed it is quite probable that the limitation to 'civil actions' means no more than that criminal proceedings are not covered by the rule-making power."

The civil statutes referred to in the *Laws of 1876*, Chapter LVII (now *M. S. A.* 611.08) will be found in Statutes at Large of Minnesota, 1873, Chapter 41, Title XIV, Article II, Section 287(16) as follows (now 597.01):

"When a witness whose testimony is wanted in any civil cause pending in this state, lives more than thirty miles from the place of trial, or is about to go out of the State, and not to return in time for trial, or is so sick, infirm, or aged *as to make it probable that he will not be able to attend at the* trial, his deposition may be taken in the manner hereinafter provided." (Emphasis supplied.)

In analyzing the intention of the Statutes above, it is clear that the Legislature intended to allow depositions in criminal matters where it appeared probable that a witness for the defendant would not be available for trial. There is no indication that the intention was to allow discovery depositions as now provided for in the *Rules of Civil Procedure*, 26.01.

M. S. A. 611.08 also has the phrase "for cause shown." This would be over and above "* * * lives more than

thirty miles from the place of trial or is about to go out of the state, and not to return in time for trial, or is so sick, infirm, or aged," as provided in Section 287(16) Statutes at Large of the State of Minnesota, 1873 (now 597.01). Furthermore, the cause shown must be something more than the fact that a person may be incarcerated, since this is a criminal statute and that was fully contemplated without the necessity of such a phrase.

To illustrate our point see footnote in *State v. Ketterer,* 244 Minn. 127, 69 N. W. 2d 115 (March 4, 1955) which states:

> "M. S. A. 1953 shows this section as having been superseded by the Rules of Civil Procedure. That is true only as to civil actions. The statute still governs as to criminal actions."
>
> See also *State v. Ketterer,* —— Minn. ——, 79 N. W. 2d 136.

The question of taking discovery depositions in the manner provided by the Rules of Civil Procedure of persons alleged to have some knowledge of relevant facts was denied on the ground that depositions for discovery purposes are authorized only in civil cases and not available in criminal cases. That is the law in the State of Minnesota and has been so declared by the Supreme Court of the State of Minnesota in the case of *State of Minnesota v. A. Arnold Axilrod, supra.* We quote from the opinion:

> "The deposition-discovery device was first authorized in this state under the rules of civil procedure, effective January 1, 1952. The statute under which the rules of civil procedure were promulgated provides in part:
>
> 'The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof *in civil actions* * * *'

"In defining the scope of the rules Rule 1, Rules of Civil Procedure, provides in part:

'These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, * * *' " (Emphasis supplied.)

* * * * *

"The right of a defendant in a criminal proceeding to take and use depositions under other existing statutes is not before us. It is sufficient that the source of the right if there is any, is not to be found in the rules of civil procedure and hence does not include the right to take depositions for discovery purposes."

There was no showing by petitioner and his counsel that any of the persons from whom he sought to obtain discovery depositions were not available for petitioner as witnesses at the trial had he subpoenaed them as provided by law.

The procedure, the evidence, the facts and circumstances testified to clearly indicate that the trial court did not rule on any federal questions and that no such questions were involved. The petitioner was given a fair trial under the rules of evidence, rules of criminal procedure and the rules pertaining to the conduct of the trial itself as provided and required by the laws of the State of Minnesota.

IV.

The proceedings before the trial court including the court's instructions to the jury were fair, regular and in all things conforming to the laws of the State of Minnesota.

Under Question II raised in the petition it is stated that the court instructed the jury as follows:

"Every homicide is presumed unlawful, so that when the mere act of killing is proved, without any

> more being shown, the killing is presumed to be intentional and malicious and promoted by the ordinary and natural operations of the mind" (R. pp. 1727, 1763).

The language of the court was based on statements made by the Supreme Court of the State of Minnesota.

State v. Prolow, 98 Minn. 459, 461, 108 N. W. 873, 874 quotes *State v. Brown*, 12 Minn. 448 (538):

> "Every homicide is presumed unlawful, and where the mere act of killing is proven, and nothing more, the presumption is that it was intentional and malicious."
>
> *State v. Shippey*, 10 Minn. 178 (273), 88 Am. Dec. 70;
>
> *State v. Hanley*, 34 Minn. 430, 26 N. W. 397;
>
> *State v. Lautenschlager*, 22 Minn. 514.

In *State v. Brown*, 41 Minn. 319, 43 N. W. 69. The court stated in its headnote:

> "1. The offense of murder in the first degree may be proved by the mere fact of the killing, and the attendant circumstances; and, where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was malicious as well as intentional, and was prompted and determined on by the ordinary operations of the mind."

Apparently the petitioner is mistaken in his claim by a failure to distinguish between any statute creating prima facie evidence and the doctrine enunciated by the court.

The instructions given by the court in the present case does not deal with any statute creating any prima facie evidence. The instruction merely sets forth a declaration of long standing and approval by our Supreme Court, namely, that "Every homicide is presumed unlawful, so that when the mere act of killing is proved, *without any more being shown* the killing is presumed to be inten-

tional and malicious and prompted by the ordinary and natural operations of the mind." (Emphasis supplied.)

State v. Prolow, 98 Minn. 459, 461, 108 N. W. 873, 874;

State v. Lautenschlager, 22 Minn. 514.

Under the same Question II petitioner brings before the court some sort of argument in respect to a failure to instruct on the presumption of innocence. What petitioner actually intends to convey to the Supreme Court of the United States by this argument is beyond our understanding and entirely immaterial in the present case since the trial court clearly instructed the jury in this matter as follows:

> "One of these rules is that the mere fact of there being an indictment against this defendant, or that he is standing trial, *does not raise any presumption that the charges made in the indictment are true.* The defendant has pleaded that he is not guilty. *He comes into the trial of this case clothed with the presumption that he is innocent.* This presumption remains in his favor to the end of the trial or until his guilt is proved. *The presumption places the laboring burden upon the State to remove its effect by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty.*
>
> *"The State has the burden to prove beyond a reasonable doubt all of the essential ingredients of the charge that is made"* (R. p. 1718). (Emphasis supplied.)

Clearly there has been no violation of the Fourteenth Amendment involved under petitioner's Question No. II.

Question III raised in the petition.

Here petitioner quotes one of his requested instructions but fails to properly quote from the court's instructions as a whole. The following is a quotation from the pertinent and applicable instructions by the trial court:

> "The State has the burden to prove beyond a reasonable doubt all of the *essential ingredients of the charge that is made*" (R. p. 1718, f. 3). (Emphasis supplied.)

In Vol. 19, *Mason's Dunnell Minnesota Digest*, 3rd Ed., page 196, note 2, it is stated:

> "A charge to the jury must be examined as a unit and not from the standpoint of passages isolated from their context or from subsequent qualifying provisions. The charge of the trial court must be viewed in its entirety and from a practical and common sense point of view" (citing cases).

In the present case, State v. Axilrod, the Supreme Court of the State of Minnesota said:

> "Viewing the instructions in their entirety, as we must, we find that they adequately and fairly explain the laws of the case."

In *State v. Pankratz*, 238 Minn. 517, 536, 57 N. W. 2d 635, 646, the court said:

> "It was not necessary to give the law in the exact language of the request so long as the applicable law was correctly stated by the court in its charge."

See also *Cameron v. Evans*, 241 Minn. 200, 208, 62 N. W. 2d 793, 798.

Swanson v. LaFontaine, 238 Minn. 460, 469, 57 N. W. 2d 262, 268.

In respect to Excuse or Justification, no such issue was presented before the trial court. In passing upon that question in the present case (State v. Axilrod) the Supreme Court said:

> "In the instant case there was no controversy regarding excuse or justification, and the State's evidence in this regard was conclusive."

No violation of the Fourteenth Amendment was involved under Question No. III in the Petition.

Ordinarily, questions of administration are left to the State, which may enforce its own notion of fairness in the administration of criminal law, "unless it is offensive to basic concepts of justice and the conscience of our people."

The requirement seems to be only that a defendant must be afforded adequate notice and adequate opportunity to make a defense.

Rule 19 of the United States Supreme Court sets forth the jurisdictional requirements for certiorari, stating in effect that the granting of the writ is not a matter of right. It is discretional and the writ will be granted only where there are special and important reasons therefor, as where a state court has decided a federal question of substance not previously determined by the United States Supreme Court or not in accordance with its decisions.

From *Minder v. Georgia,* 183 U. S. 559 we quote from headnote:

> "This court cannot interfere with the administration of justice in the State of Georgia because it is not within the power of the courts of that State to compel the attendance of witnesses who are beyond the limits of the State, or because the taking or use of depositions of witnesses so situated in criminal cases on behalf of defendants is not provided for by statute and may not be recognized in Georgia."

The decision of the Supreme Court of the State of Minnesota in the present case was unanimous.

CONCLUSION

The petition does not present any federal constitutional questions; nor does it show any violation of any federal constitutional right.

The application for a Writ of Certiorari should be denied.

Respectfully submitted,

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